Office Supreme Court, U. S.
FILED
MAR 16 1925
WM. R. STANSBURY
CLERK

Supreme Court of the United States.

October Term, 1924.

No. 331.

JAMES C. DAVIS, AGENT,
PLAINTIFF IN ERROR AND PETITIONER,

v.

L. L. COHEN & COMPANY, INC.,
DEFENDANT IN ERROR AND RESPONDENT.

ON WRIT OF ERROR AND PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF BRISTOL COUNTY OF THE STATE OF MASSACHUSETTS.

Brief for Defendant in Error and Respondent.

LOUIS SWIG,
Counsel for L. L. Cohen & Co., Inc.,
Defendant in Error, Respondent.

ADDISON C. GUTCHELL & SON, LAW PRINTERS, BOSTON.

ERRATA.

Page 3	Bogle v. Bloom, 36 Kans. 512.
Page 5	Nominsky v. New York, New Haven and Hartford Railroad Co., 239 Mass. 254.
Page 5	Atlantic & Pacific Railroad Co. v. Laird 164 U. S. 393.
Page 6	Dahn v. Davis, 258 U. S. 421.
Page 6	Missouri Pacific R. R. Co. v. Ault, 256 U. S. 554.
Page 6	Director General v. Kastenbaum, 263 U. S. 25.

Supreme Court of the United States.

OCTOBER TERM, 1924.

No. 331.

JAMES C. DAVIS, AGENT,
Plaintiff in Error and Petitioner,
v.
L. L. COHEN & COMPANY, INC.,
Defendant in Error and Respondent.

ON WRIT OF ERROR AND PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF BRISTOL COUNTY OF THE STATE OF MASSACHUSETTS.

BRIEF FOR DEFENDANT IN ERROR AND RESPONDENT.

Questions Involved.

1. Whether a ruling by a State Court upon a matter relating to pleading and practice under a state statute is binding upon the Federal Courts.

2. Whether the substitution of a party defendant, permissible under a State statute, reverts back to the date of the commencement of the action, so as not to be affected by the intervening lapse of time.

3. Whether the statutes of Massachusetts permitting the substitution of parties in a pending action and the interpretation thereof by the Massachusetts Supreme Judicial Court are in conflict with the provisions of the Transportation Act and the bill of lading.

Argument.

I. The substitution was within the discretion of the Court under the Massachusetts statutes.

Massachusetts General Laws, chapter 231, sections 51 and 138, provide as follows:

> "Section 51. The court may, at any time before final judgment, except as otherwise provided, allow amendments introducing a necessary party, discontinuing as to a party or changing the form of the action, and may allow any other amendment in matter of form or substance in any process, pleading or proceeding, which may enable the plaintiff to sustain the action for the cause for which it was intended to be brought, or enable the defendant to make a legal defence."

> "Section 138. The cause of action shall be considered to be the same for which the action was brought, if the court finds it to be the cause of action relied on by the plaintiff when the action was commenced, however the same may be misdescribed; and the allowance by the court of an amendment shall be conclusive evidence of the identity of the cause of action. But no subsequent attaching creditor or purchaser of property attached or bail or any person other than the parties to the record shall be bound by such allowance unless he has had due notice of the application for leave to amend and opportunity to be heard thereon, according to an order of notice to that effect to be issued by the court upon application of the plaintiff, and such third parties shall have the right of exception or appeal."

II. State pleading and practice is binding upon Federal Courts.

Amendments are matters relating to pleading and practice, and as such are binding upon Federal Courts.

Central Vermont Railroad v. *White*, 238 U.S. 507.
Nelson v. *Brown*, 23 Mo. 13.
Boyle v. *Bloom*, 36 Kans. 512.

What constitutes the commencement of an action in a State Court being a matter of State law, the decision of that Court on this point is not a Federal question.

Richmond Mining Company v. *Rose*, 114 U.S. 576.
Stevens's Adm. v. *Nichols*, 157 U.S. 370.
Renaud v. *Abbott*, 116 U.S. 277.

An inspection of the declaration shows that the cause of action remained the same from beginning to end, and that the only change in the proceedings was to describe the defendant as "James C. Davis, agent and director general of railroads, in possession and control of the New York, New Haven & Hartford Railroad Company, controlled and operated by the United States Railroad Administration," rather than "New York, New Haven & Hartford Railroad Company . . . controlled and operated by the United States Railroad Administration."

The intention of the parties as disclosed by the pleadings has some weight with the Court.

Davis v. *Wechsler*, 263 U.S. 22, 24.

III. Federal Courts, like State Courts, allow amendments where the cause of action remains the same.

The practice of Federal Courts is to permit amendments which enable the plaintiff to maintain an action for which it was intended to be brought, and to consider the cause of action the same if the Court finds it to be the cause of action relied on by the plaintiff when action was commenced.

Central Vermont Railroad v. *White*, 238 U.S. 507.

Seaboard Air Line v. *Renn*, 241 U.S. 290.

IV. An amendment relates back to the commencement of an action.

It is well established that, when an amendment has been properly made, and is for the same cause of action originally embraced in the writ, it relates back to the commencement of the action, and is not affected by an intervening lapse of time.

Seaboard Air Line v. *Renn*, 241 U.S. 290, 293.

Texas & Pacific Railway Co. v. *Cox*, 145 U.S. 593, 603.

Texas Cement Co. v. *McCord*, 233 U.S. 157, 164.

Heath v. *Whitten*, 29 Me. 108.

Prescott v. *Tufts*, 4 Mass. 146.

Drew v. *President*, 55 Me. 450.

Ball v. *Claflin*, 5 Pick. 303.

Blanchard v. *L.S. & M.S. Ry. Co.*, 126 Ill. 416.

So here the substitution was not deemed a change in the cause of action, and the substitution, being properly allowed, related back to the original date of the writ, and as the original writ was dated January 9, 1920, the proceedings were commenced well within the limitation of time set forth in the Transportation Act and in the bill of lading.

Texas & Pacific Railway Co. v. *Cox*, 145 U.S. 593, 603.

Arkansas Land & Lumber Co. v. *Davis*, 244 S.W. 730 (Ark.).

Payne v. *Stockton*, 147 Ark. 598.

Bailey v. *Hines*, 109 S.E. 470.

Aetna Mills v. *Director General of Railroads*, 242 Mass. 255.

Numinsky v. *New York, New Haven & Hartford Railroad Co.*, 234 Mass. 357.

Genga v. *Director General of Railroads*, 243 Mass. 101.

There is some seeming contrary authority:

Weil et al. v. *New York Central Railroad*, 196 N.Y. Supp. 869.

It may be in point to observe that in the Weil case the Court appeared to predicate its finding upon the theory that "no attempt was made to describe or refer to the Director General in the summons," leaving it open to fair conjecture that, with the facts as they are in this case, namely, some reference to the control of the Government in the writ, the decision of the Court would have been in harmony with that of the Courts cited above.

The allowance of the substitution of the party defendant as of the date of the commencement of the action is in accord with the policy of the State and Federal Courts not to permit technicalities to hinder justice.

Arkansas Land & Lumber Co. v. *Davis*, 244 S.W. 730.

Wolf v. *Cook*, 40 Fed. 432.

Bailey v. *Hines*, 109 S.E. 470.

Texas & Pacific Railway Co. v. *Cox*, 145 U.S. 593.

Atlantic & Pacific Railroad Co. v. *Laird*, 169 U.S. 393.

V. The United States made provision for suits such as was here brought.

The provisions of the Transportation Act contemplated suits in State Courts, and, as was said of another statute, "state procedure may be said to have been accepted in ad-

vance, and there appears to be no reason why it should have been supposed to have excluded ordinary incidents of state procedure."

Dickinson v. *Stiles*, 246 U.S. 631, 633.
Robb v. *Connolly*, 111 U.S. 624.
Second Employers' Liability Cases, 223 U.S. 1, 56.

While the United States Government may not be sued without its consent, yet, under certain circumstances, it subjects itself to suit on grounds broader than the strict limitations of a statute authorizing suit.

Dahn v. *Davis*, 257 U.S. 421.

However this may be, the Government here gave its consent to be sued, for it is clearly stated in the Federal Control Act (40 St. L. 451, c. 25) that, "in any action at law, or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government."

The Government undertook as carrier to observe all existing laws; as has been well stated by this Court in the cases of—

Missouri v. *Ault*, 256 U.S. 554.
Director General v. *Kastenbaum*, 263 U.S. 25.

And this observance carried with it an observance of the rules of practice of the jurisdiction wherever the cause of action would arise.

And while the question here involved has not been directly passed on by this Court so far as the defendant in error is aware, it may not be amiss to observe that this Court has cited with approval *Genga* v. *New York, New Haven & Hartford R.R.*, 243 Mass. 101, which case, in certain of its aspects, involved the instant issue.

Director General v. *Kastenbaum*, 236 U.S. 25.

VI. Cases where substitution has been refused have been predicated upon the wording of State statutes and where there has been a personal obligation on the part of a public officer.

A casual reading of some cases leads to the notion that this Court has inferentially created precedents favorable to the plaintiff in error, but it is the view of counsel that these cases really support the view of the defendant in error.

Pullman Co. v. *Croom*, 231 U.S. 571.
Smietanka v. *Indiana Steel Co.*, 257 U.S. 1.
Whalen Paper & Pulp Mills v. *Davis*, 288 Fed. 438.
Union Pacific Ry. Co. v. *Wyles*, 158 U.S. 285.
United States v. *Dalcour*, 203 U.S. 408, 423.
Texas Cement Co. v. *McCord*, 233 U.S. 157, 164.
Davidson v. *Payne*, 289 Fed. 69.

In *Pullman Co.* v. *Croom*, 231 U.S. 571, the Court was dealing with mandamus, and pointed out that the purpose of a writ of mandamus is to enforce personal obligation of an individual, and that mandamus does not reach the office, wherefore there could be no substitution.

That case does not hold here, because there was no personal obligation of the Director General involved.

In *Smietanka* v. *Indiana Steel Co.*, 257 U.S. 1, the Court was again discussing an action where a public officer was personally liable.

While in *Whalen Paper & Pulp Mills* v. *Davis*, 288 Fed. 438, the question of proper service was the determining point, and in that case there had not been proper service.

The case of *Union Pacific Ry. Co.* v. *Wyles*, 158 U.S. 285, holds that "an amendment relates back to the time of the filing of the original petition, so that the running of the statute of limitations against the amendment is arrested thereby. But this ruling applies only to an amendment which

does not create a new cause of action." The Court rightly enough held that an amendment switching a cause of action founded on the general law of master and servant to one founded on a Kansas statute was a new cause of action.

And so too in *United States* v. *Dalcour,* 203 U.S. 408, 423, there was an endeavor to shift the cause of action predicated upon treaty to one founded on statute, and naturally enough the Court held the proposed amendment was not the same cause of action.

In *Texas Cement Co.* v. *McCord,* 233 U.S. 157, 164, the Court stated that an amendment dates back to the filing of a petition; but the original suit, having been prematurely brought, an intervention of parties seeking to avail themselves of the earlier suit was futile.

In *Davidson* v. *Payne,* 289 Fed. 69, there was no substitution of a proper person against whom action would lie, and besides, at the time the suit was brought, there was no such person in office as the one described in the writ.

Chrisp v. *Davis,* 263 U.S. 710, in which a petition for certiorari came up from an Arkansas Court (159 Ark. 305), involved an interpretation of a State statute, and the Federal Court merely followed the State Court in its interpretation of the state practice and the statute.

In *Davis* v. *Wechsler,* 263 U.S. 22, the Court stated that "local practice shall not be allowed to put unreasonable obstacles in the way," and apparently construed the action of the State Court as "an unreasonable obstacle," because of the disregard by the State Court of plain provisions of the Federal statute, which provided where a suit should be brought.

A sense of justice and the intent of Congress as reflected in legislation passed since the original Transportation Act speak out against the mere technicalities raised by the plaintiff in error. Congress by the language of the Transportation Act and the amendment of March 3, 1923, intended no just claim to be side-tracked through errors of

form in bringing suits arising out of the Government operation of railroads.

Transportation Act of 1920, 41 St. L. 456, par. a, sec. 206.

Transportation Act as amended, 42 St. L. 1443, c. 233.

VII. Conclusion.

It is respectfully submitted that the judgment of the Superior Court of the Commonwealth of Massachusetts, entered in accordance with the rescript from the Supreme Judicial Court, was in accord with sound principles of justice, and in harmony with the rules of practice and pleading in the Courts of Massachusetts and of the Federal Courts.

LOUIS SWIG,
Counsel for L. L. Cohen, Inc.,
Defendant in Error and Respondent.